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No. 07-768

In The
Supreme Court of the United States

DAYTONA GRAND, INC. and MILES WEISS,
Petitioners,

v.

CITY OF DAYTONA BEACH, FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Eleventh Circuit correctly hold that the City of Daytona Beach's ordinances prohibiting public nudity and regulating near-nudity in establishments that serve alcohol further a substantial government interest under *United States v. O'Brien*, 391 U.S. 367 (1968) and its progeny?

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COUNTERSTATEMENT OF THE FACTS

In 1981, after years of increasing urban blight and economic decline—and testimony concerning illicit sexual behavior, drug use, and other crimes in and around adult businesses—the City of Daytona Beach adopted various zoning and regulatory ordinances in an effort to reduce these adverse secondary effects. App. 3. The City's zoning ordinances permitted adult theaters to open only in the City's business automotive zoning districts and prohibited them from locating within certain distances of churches, schools, parks, playgrounds, or other sexually oriented businesses. App. 3. The City's regulatory measure, Ordinance 81-334, prohibited nudity and sexual conduct in establishments that serve alcohol. App. 10.

These ordinances were challenged multiple times in state and federal courts, and were upheld as constitutional in each case. *City of Daytona Beach v. Del Percio, Inc.*, 476 So. 2d 197 (Fla. 1985) (finding the record "replete with the legislative findings of the city commission and supporting reports and documents provided by the police, indicating that nude dancing in Daytona Beach contributes to criminal activities"); *Function Junction v. City of Daytona Beach*, 705 F. Supp. 544 (M.D. Fla. 1987), *aff'd* 864 F.2d 792 (11th Cir. 1988) (upholding zoning ordinance); *Geneas v. Willets*, 715 F. Supp. 334 (M.D. Fla. 1989), *aff'd* 911 F.2d 579 (11th Cir. 1990) (upholding alcohol ordinance); *Morgan v. Daytona Beach*, 678 So. 2d 352 (Fla. Ct. App. 1996) (upholding zoning ordinance).

By 2001, the City realized that multiple bars were exploiting a loophole in Ordinance 81-334 by

separating alcohol and nudity within a single structure but allowing for ready access between the two areas. The City was also concerned that lewd and lascivious conduct in adult theaters was increasing and that nudity in parks, streets, and other public places was especially a problem during events such as Spring Break. Consequently, the City enacted Ordinance 02-496, which generally prohibited nudity in any public place. The explicit purpose of Ordinance 02-496 was to reduce "lewd and lascivious behavior, prostitution, sexual assaults and batteries, other criminal activity, the degradation of women, and activities that break down family structures and values." App. 13. In 2003, the City enacted Ordinance 03-375, which amended Ordinances 02-496 to allow erotic dancers to wear G-strings and pasties "within a fully enclosed structure legally established as an adult theater" that is more than 500 feet from an establishment that serves alcohol. Within 500 feet of an alcohol-serving establishment, however, Ordinance 02-496 requires dancers to wear clothing somewhat more modest than G-strings and pasties. App. 17.

COUNTERSTATEMENT OF PROCEEDINGS BELOW

In December 2003, Daytona Grand filed this lawsuit in federal district court challenging the constitutionality of the City's zoning, nudity, and alcohol ordinances. The district court granted summary judgment to the City that its zoning ordinance is constitutional and that its nudity and alcohol ordinances are narrowly tailored. The district court ruled, however, that there was a genuine issue of material fact whether the three nudity ordinances

furthered a substantial government interest. App. 19-20.

During a bench trial, Daytona Grand attempted to cast direct doubt on the City's rationale for the nudity ordinances by presenting the testimony of two expert witnesses who conducted empirical studies using data provided by the City. The experts concluded that adult theaters in Daytona Beach had no statistically significant effect on crime rates, and that the City's evidence to the contrary was "shoddy" and "meaningless." The district court agreed and found that

> the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, "meaningless."

App. 20-21. Finding that the additional evidence the City provided to renew support for its ordinances was similarly flawed, the district court held that the three nudity ordinances violated the First Amendment because they did not further a substantial government interest. App. 21.

On appeal, the Eleventh Circuit affirmed the district court's holding that the City's adult zoning

ordinance is constitutional. App. 27. On the issue of a substantial government interest, the Eleventh Circuit found that the City easily carried its initial burden to show that the nudity and alcohol ordinances furthered its interest in reducing the negative secondary effects associated with adult theaters by producing a substantial body of evidence reasonably believed to be relevant to combating those problems. For example, in the text of Ordinance 81-334, the City found that nudity and sexual conduct combined with alcohol in public places begets crime and other undesirable behavior that results in dangers to the public health, safety, and welfare. App. 38.

To support this rationale, Ordinance 81-334 cites two Supreme Court decisions, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (*per curiam*) and *California v. LaRue*, 409 U.S. 109 (1972), both of which upheld prohibitions on nude dancing in establishments that serve alcohol. App. 38-39. This Court has approved municipal reliance on evidence of negative secondary effects presented in previous judicial opinions:

> Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), and *California v. LaRue*, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and

> *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 51-52 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient).

City of Erie v. Pap's A.M., 529 U.S. 277, 296-97 (2000).

In addition, the legislative history of Ordinance 81-334 shows that the City relied on its own experiences to support its rationale. That legislative history includes a list of arrests for prostitution and other crimes in or near many Daytona Beach adult businesses, the City police chief's memorandum listing incidents that occurred near topless bars, police dispatch records from areas around adult businesses, police reports of 83 prostitution arrests and seven arrests for assault and battery of a police office near an adult theater, and local business owners' firsthand accounts of crime around adult businesses. App. 39-40.

The other two nudity ordinances were similarly replete with evidence. The City enacted Ordinance 02-496, a general public nudity ordinance, to protect and preserve the health, safety, and welfare of the City's residents in the face of its findings that public nudity increases lewd and lascivious behavior and crime, encourages degradation of women, and facilitates other activities that break down family structures and values. To support these findings, the City relied on newspaper articles describing incidents of public nudity and other crimes during Spring Break,

detectives' reports of sexual conduct and nudity by dancers at adult theaters, and this Court's decisions *Pap's A.M.*, 529 U.S. 277, and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). App. 41.

In support of Ordinance 03-375, the City relied on testimony in a prior federal court lawsuit challenging the City's zoning ordinances. In that prior case, the City's director of planning and redevelopment offered expert testimony that, based on his education, experience, knowledge of blight in Daytona Beach, and his participation in drafting the ordinances, live nude and seminude entertainment businesses promote and perpetuate urban decay and that adult businesses have impacted crime in the area surrounding Daytona Beach. App. 5-6, 43. Similarly, an assistant state attorney in Daytona Beach testified that there definitely were more drug and prostitution offenses in topless bars than in other bars. App. 6, 43. In addition, the City relied on several expert studies concluding that (1) erotica led males to drink more alcohol than otherwise, (2) young men who believed they had consumed alcohol displayed greater interest in viewing violent and/or erotic images and reported increased sexual arousal, and (3) participants perceived a woman who they believed had consumed alcohol to be significantly more aggressive, impaired, sexually available, and likely to engage in foreplay and intercourse. Finally, Ordinance 03-375 expressly incorporates all the evidence on which the City relied to support the other two nudity ordinances. In the face of this overwhelming evidence supporting the findings and rationales, the Eleventh Circuit found that the City easily carried its initial burden to show that the three nudity ordinances furthered its interest in

reducing the negative secondary effects associated with adult theaters. App. 44.

Daytona Grand attempted to cast direct doubt on the nudity ordinances by presenting the testimony of two expert witnesses. In general, the experts criticized the City's evidence as shoddy, meaningless, and unreliable. App. 45. To buttress the criticisms, the experts conducted two empirical studies using data provided by the City. In the first study, the experts compared 911 emergency call data from areas in Daytona Beach that had adult theaters to control areas that did not. The experts claimed to find no statistically significant differences in overall rates of crime between study and control areas and so concluded that they cast grave doubt on the City's findings that the combination of nude dancing and alcohol increases crime. App. 46. In the second study, the experts concluded that other demographic variables—population, age structure, racial and ethnic composition, housing vacancies, female-headed households, and the number of alcohol retail sale establishments—were statistically strongly related to crime whereas adult theaters accounted for an insubstantial amount of crime. App. 47.

After thoroughly considering all of Daytona Grand's experts' testimony, the Eleventh Circuit found it insufficient to cast direct doubt on the aggregation of evidence that the City reasonably relied upon when enacting the nudity ordinances for three reasons. App. 53. First, the experts' studies are based solely on 911 emergency call data. Reliance on such data to measure crime rates is problematic, the court found, because many crimes do not result in calls to 911 and

therefore do not have corresponding records in the City's data. This is especially true for many crimes the ordinances specifically target—such as prostitution, lewd and lascivious behavior, and salacious sexual conduct among patrons and employees of adult theaters—because all people involved in such crimes are willing participants who rarely call 911. App. 54-55. In this case, the City's evidence included numerous undercover investigation reports documenting lewd and lascivious conduct, illicit sexual behavior, and solicitation for prostitution. For this reason, the Eleventh Circuit found that the data relied on by both studies may substantially undercount many of the crimes the City sought to reduce. App. 58-59.

Second, the experts drew conclusions that overstated the underlying data. Indeed, some portions of the experts' studies actually support the City's rationale for its ordinances. For example, in the study focusing on Ordinance 81-334, three of the six study areas (areas containing adult theaters) actually showed significantly higher rates of police activity than the control areas (areas not containing any adult theaters). App. 56. The same study also found a statistically significant increase in "norm violations"—drunkenness, disorderly conduct, drug offenses, liquor law violations, and weapons complaints—in areas with adult theaters compared to control areas. Moreover, the study focusing on Ordinance 02-496 found a statistically significant increase in drug related offenses in areas with adult theaters compared to control areas. App. 57 n.34.

Third, both studies focused only on crime and did not address at all the City's evidence that adult

theaters tend to perpetuate other features of urban blight, including deteriorating structures, small lots, parking problems, and antiquated underground utility systems. App. 58. For all these reasons, the Eleventh Circuit held that Daytona Grand failed to cast direct doubt on all the evidence on which the City reasonably relied in enacting the challenged ordinances; therefore, the ordinances further a substantial government interest. App. 58-59.

Finally, the Eleventh Circuit upheld the nudity ordinances as narrowly tailored. Under those ordinances, dancers in adult theaters located more than 500 feet from establishments that serve alcohol must wear at least pasties and G-strings, whereas dancers in adult theaters located within 500 feet of alcohol establishments must wear slightly more modest clothing. App. 61. Daytona Grand argued that this latter requirement was not narrowly tailored. Citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989), the court noted that a regulation is narrowly tailored so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." App. 60. Following this Court's decisions in *Pap's A.M.* and *Barnes*, the Eleventh Circuit proclaimed it well established that a nudity ordinance that imposes a minimum requirement of G-strings and pasties is narrowly tailored. App. 61. The court ruled that the First Amendment does not prevent a city from limiting the venues where dancers may communicate their erotic message. The court noted that the City's ordinances do not prohibit all nude dancing, but only restrict it in locations within 500 feet of alcohol establishments, which is where the unwanted secondary effects arise

as documented by the extensive legislative record. The Eleventh Circuit followed its own precedent holding that regulations on nude dancing near alcohol establishments do not unduly restrict the ability of dancers to communicate their erotic message. Accordingly, the court held that the City's ordinances are narrowly tailored. App. 62-63.

After the Eleventh Circuit denied a petition for rehearing *en banc* App. 66), Daytona Grand filed its petition for a writ of certiorari in this Court. Daytona Grand does not contest the Eleventh Circuit's ruling that the zoning ordinances are constitutional; instead, it only asks this Court to review the Eleventh Circuit's holdings that the nudity ordinances serve a substantial government interest and are narrowly tailored.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

As an initial matter, this case is not a proper vehicle for deciding the questions presented by Daytona Grand's petition. Daytona Grand, doing business as Lollipop's Gentlemen's Club, seeks to continue offering nude dancing in its establishment at 639 Grandview Avenue in Daytona Beach, which it has been doing illegally since October 2000. App. 28-29.

Adult theaters (nude dancing establishments) like Lollipop's, however, are not allowed at Lollipop's location as it is in neither a BA nor M-5 zoning

district. App. 22. The district court upheld the City's zoning requirements for adult businesses, and Daytona Grand appealed that determination to the Eleventh Circuit. App. 20-21. The Eleventh Circuit affirmed the district court on this issue, and Daytona Grand did not petition for review of that determination. This means that the City's zoning ordinance—which prohibits nude dancing establishments at Lollipop's location—is intact.

To maintain a federal lawsuit, a plaintiff must demonstrate (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These three factors constitute "the irreducible constitutional minimum of standing." *Id.*

Daytona Grand's petition suffers from a fatal redressability problem: even if Daytona Grand were to prevail against the City's nudity and alcohol ordinances—the only ordinances addressed in the petition, Pet. at 2—it could not operate an adult business with nude dancing at its present location. The City's zoning ordinance prevents Daytona Grand from doing so, and Daytona Grand did not petition for review of this independent bar to Daytona Grand's desire to offer nude dancing at its present location. Nor does the record reveal any intent by Daytona Grand to operate an adult theater in another location in Daytona Beach. Thus, the Court should deny the petition for certiorari.

II. THE PETITION'S CLAIMS OF SIGNIFICANT LOWER COURT CONFUSION AND CIRCUIT SPLITS LACK MERIT.

A petition for a writ of certiorari will be granted only for compelling reasons, such as when a U.S. court of appeals has decided an important federal question (1) in a way that conflicts with the decision of another U.S. court of appeals or a state court of last resort, (2) that has not been, but should be, settled by this Court, or (3) that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule. *See* United States Supreme Court Rule 10.

It bears noting that Daytona Grand's petition is strikingly similar to the recent petition filed in *Edward Green Jameson v. Commonwealth of Kentucky*, No. 06-1697. Indeed, one of the questions presented, and many of the paragraphs purporting to assert reasons for granting the writ, in Daytona Grand's petition are taken *verbatim* from the petition in *Jameson*. Accordingly, this Court should deny Daytona Grand's petition for all the reasons it denied the *Jameson* petition on October 1, 2007.

Beyond these flaws, Daytona Grand's petition fails to establish any compelling reason to grant the writ. Indeed, Daytona Grand fails to identify *any* portion of the Eleventh Circuit's ruling that has not been, but should be, settled by this Court, or that conflicts with relevant decisions of this Court. Instead, Daytona Grand argues that the Court's plurality decisions have engendered confusion in the lower courts—without disclosing that those courts unanimously agree on

what constitutes the holding of each of this Court's decisions and that the lower courts are quite consistent in the results that they reach. Contrary to Daytona Grand's suggestion, the opinion below does not conflict with the decision of another U.S. court of appeals or a state court of last resort. Finally, while Daytona Grand alleges circuit splits on other topics within the area of regulation of sexually oriented businesses, neither the facts nor opinion in this case give rise to those questions or present a proper vehicle for this Court to address them. For all these reasons, this Court should deny the petition for a writ of certiorari.

A. THIS COURT'S JURISPRUDENCE CONCERNING THE REGULATION OF SEXUALLY ORIENTED BUSINESSES HAS NOT ENGENDERED SIGNIFICANT CONFUSION AMONG LOWER COURTS.

Daytona Grand's primary argument supporting its petition for writ of certiorari is that "the highly-fractured nature of this Court's plurality opinions regarding the 'secondary effects' doctrine has led to significant confusion and conflict in the lower courts." Pet. 6. Although several of this Court's decisions in this area of law are indeed plurality opinions, the resulting jurisprudence is clear and consistent.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court set forth the standard for evaluating restrictions on expressive conduct under the First Amendment:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The Court applied this standard in the adult business context in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There, the Court considered a time, place, and manner regulation that required adult theaters to locate more than 1,000 feet from residential zones, dwellings, churches, parks, and schools. *Id.* at 46. The Court stated that "content-neutral" speech regulations—those that are justified without reference to the content of the regulated speech—"are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47-48.

With regard to whether the ordinance served a substantial governmental interest, the Court held that Renton was entitled to rely on the experiences of other cities and the findings summarized in judicial decisions about the secondary effects associated with sexually oriented businesses. *Id.* at 51-52. The Court stated the city was not required to rely on local studies, nor was it required to conduct new studies or to produce evidence independent from that produced

by other cities. *Id.* Under *Renton*, a regulation satisfies the First Amendment "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

Five years later, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court applied *O'Brien* analysis to a state statute prohibiting public nudity when it was challenged on First Amendment grounds by establishments that desired to provide totally nude dancing. 501 U.S. at 567 (plurality opinion); *id.* at 582 (Souter, J., concurring). Despite the lack of *any* legislative history or record evidence concerning secondary effects, the nudity ban in *Barnes* was upheld because it served a current governmental interest in preventing the negative secondary effects associated with nude dancing. *Id.* at 582-83 (Souter, J., concurring).

Relying on *Renton*, the controlling opinion in *Barnes* concluded that live nude dancing would likely produce the same negative secondary effects as the type of entertainment at issue in previous Court decisions (*i.e.*, *Renton*, *American Mini Theatres*, *LaRue*), and that the statute therefore served a substantial government interest in preventing such adverse effects. *Id.* at 584. The opinion agreed with "*Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects," and it held that regulating adult businesses due to their correlation with secondary effects is unrelated to the suppression of free expression. *Id.* at 584-86.

More recently, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court applied *O'Brien* analysis and the evidentiary standard set forth in *Renton* to conclude that a ban on public nudity, which required erotic dancers to wear pasties and g-strings, furthered the government interest in preventing harmful secondary effects and did not violate the First Amendment. The court approved the city's reliance on previous judicial decisions that described the evidentiary basis for similar regulations. *Id.* at 296-97. It also recognized that the city's own secondary effects findings—unaided by extrinsic evidence—are sufficient in the absence of specific reason to doubt them. *Id.* at 297-98. Finally, the Court rejected the idea that empirical analysis or academic studies are required for establishing a substantial government interest under *O'Brien*, holding that the government has a "freer hand" when regulating conduct. 529 U.S. at 299-300.

Finally, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the Court applied *Renton* analysis to a unique zoning regulation prohibiting the combination of adult bookstore and adult arcade operations under one roof. The city contended that such combinations would have the same zoning-type secondary effects as the city had found, in an earlier study, to be associated with separate sexually oriented businesses clustered in a neighborhood. 535 U.S. at 430-31.

Los Angeles—which relied *solely* on its 1977 zoning study—admitted that it did not study the effects of "any separate-standing adult bookstore or arcade," let alone any "combination" establishments. *Id.* at 436.

Although the lower courts granted summary judgment against the city for lack of specific evidence concerning "combination" businesses, this Court reversed, holding that the circuit court erred in "refus[ing] to allow the city to draw the inference that 'the expansion of an adult bookstore to include an adult arcade would increase' business activity and produce the harmful secondary effects" identified in the city's zoning study. *Id.* at 436-37 (quoting 222 F.3d 719, 726 (9th Cir. 2000)). The Court also explained that while a city must provide evidence supporting its own rationale, the city "does not bear the burden of providing evidence that rules out" alternative theories of secondary effects. *Alameda Books*, 535 U.S. at 437 ("The Court of Appeals simply replaced the city's theory . . . with its own . . . .").

Alameda Books clarifies that the latitude given cities to address secondary effects allows reliance on evidence of harm not directly on point with the regulation adopted, but nevertheless supportive of an inference justifying the regulation. It was in this context of relying on an inference that the plurality introduced a burden-shifting procedure—not to "appraise the wisdom of the City's decision," *Renton*, 475 U.S. at 52, but only to ensure that "the municipality meets the [reasonably believed to be relevant] standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39.

Justice Kennedy's concurrence stressed that a city cannot advance a content-based rationale, *i.e.*, that the city will reduce secondary effects because its regulation will force the closure of one or more adult businesses. *Id.* at 450-51. Rather, a city must

"advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449. This is the "proposition [that] a city need[s] to advance in order to sustain a secondary-effects ordinance." *Id.*

Justice Kennedy agreed with the plurality that the city's inference, drawn from its zoning study, was reasonable. *Id.* at 450-52. He emphasized that cities need only rely on some evidence "reasonably believed to be relevant" when reaching legislative judgments concerning secondary effects, acknowledging that city councils are in a better position than the courts to make policy decisions affecting their municipalities. *Id.*

The Eleventh Circuit faithfully applied these precedents in the opinion below when it ruled, as a matter of law, that the City's nudity ordinances serve a substantial governmental interest. It properly evaluated all the evidence under the *Alameda Books* framework to ensure that the City relied on evidence "reasonably believed to be relevant" to the secondary effects the ordinances seek to address. Consistent with this Court's on-point decisions in *Barnes* and *City of Erie*, the Eleventh Circuit held that the City's extensive legislative record and its rationale of preventing illicit sexual behavior and other secondary effects satisfied the *O'Brien / Renton* standard.

Conspicuously, Daytona Grand does not argue that even one legal principle on which the Eleventh Circuit based its decision is contrary to or inconsistent with what Daytona Grand insists is this Court's supposedly

fractured and confusing jurisprudence. Daytona Grand's arguments against the ruling below consist of alleged misapplication of a properly stated rule of law and are therefore an inappropriate basis for granting certiorari. *See* United States Supreme Court Rule 10.

Ignoring this fatal defect in its petition, Daytona Grand contends that "a number of courts have devoted substantial portions of their opinions just trying to decipher what these split decisions mean." App. 8 (citing cases). Daytona Grand's claim conflates analysis with confusion. In each of the cited opinions, the various courts simply proceed, as required, to discern the holding of a plurality decision of this Court under *Marks v. United States*, 430 U.S. 188 (1977) (explaining that the holding of a plurality decision may be viewed as that position taken by those justices who concur in the judgment on the narrowest grounds). In each of those cases, the courts perform the same analysis under *Marks* and arrive at the same conclusions as to which of this Court's opinions constitute the holding of a plurality decision. Indeed, in the opinion below, the Eleventh Circuit demonstrates that, in those same cases in which Daytona Grand claims courts struggled to decipher this Court's meaning, all the courts reached the same conclusion. App. 31 n.19.

Notwithstanding Daytona Grand's claim of confusion, lower courts have carefully followed this Court's precedents and have reached consistent results regarding regulation of nude conduct in sexually oriented businesses. *See, e.g.*, *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003) (rejecting adult business's challenge to nudity regulation). Because all

the circuit courts concur with the Eleventh Circuit's findings as to this Court's holdings in plurality opinions, Daytona Grand's claim of "significant confusion" on this point is demonstrably incorrect.

B. DAYTONA GRAND HAS NOT IDENTIFIED ANY CIRCUIT SPLIT EMANATING FROM THE OPINION BELOW.

Just as Daytona Grand's petition fails to identify any important federal question in the opinion below that either conflicts with relevant decisions of this Court or that has not been settled by this Court, it also fails to identify a circuit split. In fact, most of the issues on which Daytona Grand attempts to manufacture a circuit split are not even implicated in the decision below.

The first issue on which Daytona Grand maintains a circuit split exists is "the weight to be given recent local scientific studies as compared to anecdotal accounts or reports compiled many years ago in other jurisdictions." Pet. 12. The reason Daytona Grand does not cite the opinion below as creating a split on this issue is that the Eleventh Circuit gave Daytona Grand's two expert studies all the weight they deserved. After extensively analyzing those studies, the Eleventh Circuit found them, by their own terms, flatly insufficient as a matter of law because the

> Data relied on by both studies may substantially undercount incidents of many of the types of crime that the City sought to reduce; the data that the studies did analyze show some statistically significant correlations

> between adult theaters and increased criminal activity; and the studies completely fail to address evidence of increased urban blight and decay that the City reasonably relied on when enacting Ordinance 03-375. Thus, [Daytona Grand] has failed to cast direct doubt on all of the evidence that the City reasonably relied on when enacting the challenged ordinances.

App. 58-59. In short, the Eleventh Circuit upheld the ordinances not because it gave undue weight to the City's allegedly "anecdotal" evidence, but rather because Daytona Grand's experts' studies were simply unreliable, incomplete, and actually supported part of the City's rationale for its ordinances.

In lieu of the decision below, Daytona Grand maintains that *Commonwealth of Kentucky v. Jameson*, 215 S.W.3d 9 (Ky. 2006), created a circuit split on this issue. Pet. 13-15. As noted, this Court denied a strikingly similar petition for writ of certiorari making the same claim of a circuit split in that very case on October 1, 2007. *See* No. 06-1697.

The second issue on which Daytona Grand maintains a circuit split exists is "whether the generally relied-upon secondary effects reports examining adult bookstores and live entertainment venues can be used to justify regulations of 'take-out' only facilities where there is no viewing of adult entertainment on the premises." Pet. 18. Here, of course, Daytona Grand describes its establishment as an adult cabaret that has featured live exotic dance performances in a barroom setting since October 2000. Pet. 2-3. Since Daytona Grand admits that it features

live entertainment and does not operate a so-called "take out" establishment, this Court could not address any alleged circuit split on that issue through this case.

Similarly, Daytona Grand alleges a conflict among the circuits on "whether secondary effects can justify a government interest in regulating a *single* instance of expressive activity." Pet. 18. Again, Daytona Grand's establishment has regularly featured live exotic dance performances in a barroom setting since October 2000. Pet. 2-3. Therefore, the constitutionality of regulating a single performance is not at issue in this case.

Next, Daytona Grand alleges a split of authority on whether the court may consider only the secondary effects evidence the government adduces prior to passing the regulation or whether it may also consider post-enactment evidence. Pet. 23-25. Ironically, Daytona Grand concedes that this Court has held that "a governmental interest need not be identified at the time of enactment of a regulation, but may be established later during litigation." Pet. 24 (citing *Barnes*, 501 U.S. at 582). There can be no circuit split on a point of law this Court has already proclaimed. In any case, the Eleventh Circuit considered only the City's preenactment evidence in its legislative record and found that Daytona Grand had failed to cast direct doubt on it; therefore, the Eleventh Circuit did not examine the City's post-enactment evidence. App. 59 n.35. Therefore, this case is not the appropriate vehicle for this Court to address any such issue.

Daytona Grand argues that the Eleventh Circuit created a circuit split by holding that "a City is not required to justify its ordinances with empirical evidence or scientific studies." Pet. 15. There is no circuit split on this point because the Eleventh Circuit's holding derives directly from relevant decisions of this Court. As this Court has held, "legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (Souter, J., concurring in judgment) (following *Renton*, 475 U.S. 41, 51-52)). Indeed, as the Ninth Circuit has noted, "[a]ll five Justices in the *Alameda Books* majority affirmed *Renton's* core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books*, 535 U.S. at 438 (plurality opinion); *id.* at 451 (Kennedy, J., concurring)." *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004). To whatever extent some other court may have required the government to support its rationale with scientific or empirical evidence, it is contrary to existing precedent. Daytona Grand cannot create a split of authority on the back of an opinion, if there is one, so obviously contrary to governing law.

Furthermore, Daytona Grand argues that the Eleventh Circuit created a circuit split by finding that the studies and opinion of Daytona Grand's expert witness, Daniel Linz, "were insufficient to overcome 'common sense', the experiences of other cities and 'city officials' local knowledge'." Pet. 19. Daytona Grand claims the Eleventh Circuit's rejection of Linz creates

a circuit split with *Abilene Retail #30, Inc. v. Board of Comm'rs of Dickinson County, Kan.*, 492 F.3d 1164 (10th Cir. 2007), in which the Tenth Circuit determined that an allegedly similar study by Linz was sufficient to cast doubt on the county's secondary effects evidence. Pet. 20. The Tenth Circuit's holding does not create a circuit split resolvable by Daytona Grand's petition because, *inter alia*, the Tenth Circuit's decision is contrary to this Court's precedents that have uniformly rejected Linz's testimony.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), Dr. Linz submitted, as an appendix to an *amicus* brief filed by adult business lawyers, a paper attacking several secondary effects studies relied upon by legislative bodies on the ground that they did not meet the standards set forth in *Daubert*. *See* Brief and Appendix of First Amendment Lawyers Association, 1999 WL 805047, *20 (noting that according to Dr. Linz's attached paper, "absolutely none of the studies that purport to find such a connection [between sexually oriented businesses and secondary effects] have been conducted with methodology sound enough" to satisfy *Daubert*).

In *City of Erie*, Justice O'Connor's plurality noted the city council's legislative findings—which were unsupported by any evidence in the record—were to be treated as "expert judgment" that "should be credited." 529 U.S. at 298. The plurality then addressed Dr. Linz's paper: "And the study relied on by *amicus curiae* does *not cast any legitimate doubt* on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23." *Id.* (emphasis supplied).

Later, in addressing the dissenting opinion that empirical proof should be required, the plurality again referenced Dr. Linz's paper and stated that the Court had "flatly rejected" the idea "that the 'invocation of academic studies said to indicate' that threatened harms are not real is insufficient" in the legislative context. *Id.* at 300 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 (2000) (rejecting First Amendment challenges to campaign finance regulations)).

In *Alameda Books*, the plurality—again over a dissent *and* a Linz paper submitted with an *amicus* brief, *see* 2001 WL 950921—*rejected* a requirement of empirical evidence and emphasized that when challenging whether *Renton's* deferential standard has been met, the challenger must address "the *municipality's* rationale," not an alternative rationale imposed by an industry witness. 535 U.S. at 437-39.

Dr. Linz does not dispute *any* of the facts recited in *any* of the studies, only the conclusions to be drawn from them. Because he applies a different standard—one much higher than the Supreme Court requires—he rejects any reliance on any study that finds secondary effects. However, the purpose of *Alameda Books* burden-shifting is simply to ensure that the Board "meets the standard set forth in *Renton*," *id.* at 439, not *Daubert* or Dr. Linz's idiosyncratic permutation of that standard. By accepting Dr. Linz's testimony as sufficient to cast direct doubt on the county's rationale for its ordinance in *Abilene Retail*, the Tenth Circuit contravened this Court's precedent.

Finally, Daytona Grand argues that there is a circuit split on whether the requirement to wear G-strings and pasties is the maximum requirement a government can use to regulate erotic dancing. Pet. 29. As an initial matter, Daytona Grand ignores the fact that erotic dancers in Daytona Beach can strip all the way down to their pasties and G-strings in legally established adult theaters more than 500 feet from alcohol establishments.

Second, Daytona Grand fails to show any error of law in the Eleventh Circuit's decision. Under intermediate scrutiny, a requirement is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Provided "the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Under this analysis, this Court has upheld similar regulations of nudity in alcohol beverage establishments. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 714 n.1 (1981) (upholding regulation requiring coverage of the *entire* portion of the female "breast below the top of the areola, or any simulation thereof").

Here, the Eleventh Circuit correctly held that the City's nudity ordinances are narrowly tailored because their purpose of decreasing adverse secondary effects would be achieved less effectively absent the regulation. App. 62-63. As the district court held,

given the City's extensive evidence that alcohol consumption in adult theaters creates secondary effects, the ordinance's buffer requirement reflects a reasonable, and constitutionally permissible, attempt to address such secondary effects. In addition, the regulation leaves dancers ample capacity to convey their erotic message. As the district court found in its summary judgment order, there is simply no indication that a buffer, which has the aim of deterring customers from drinking alcohol in or around adult businesses, has any effect whatsoever on the dancers' erotic message. *See City of Erie*, 529 U.S. at 301 (citing *Barnes*, 501 U.S. at 587 (1991) (Souter, J., concurring in judgment) (noting that a "dancer's remaining capacity and opportunity to express the erotic message" includes doing so "by articulate speech or representational means; a pornographic movie featuring one of respondents, for example, was playing nearby without any interference from the authorities at the time these cases arose.")).

Daytona Grand argues that the Eleventh Circuit's ruling on this point is contrary to this Court's proclamation that G-strings and pasties are the maximum permissible regulation of nude dancing under the First Amendment. Pet. 29. In *City of Erie*, Justice O'Connor noted that

> The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the

> dancer's erotic message. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. at 572 (plurality opinion of REHNQUIST, C. J., joined by O'CONNOR and KENNEDY, JJ.); 501 U.S. at 587 (SOUTER, J., concurring in judgment).

529 U.S. at 301. This holding does not mean, as Daytona Grand argues, that the government interest in prohibiting public nudity is met as soon as a performer is wearing pasties and G-strings. Pet. 29. To be sure, pasties and a G-string is the least restrictive amount of covering that can prevent nudity, and the Court therefore deemed it *de minimis*. But the *Erie* Court's statement that the pasties and G-string requirement "leaves ample capacity to convey the dancer's erotic message" does not mean that a nudity regulation must leave the exact same amount of flesh uncovered. Such a construction would be inconsistent with *Ward's* recognition that regulations of expressive conduct are constitutional "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." 491 U.S. at 799. Moreover, such a construction would leave cities unable to address documented secondary effects associated with nearly-nude dancing in sexually oriented businesses.

The only case Daytona Grand cites as creating a circuit split on this issue is *R.V.S. v. L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004). That case is completely inapposite. In that case, the city had an ordinance regulating sexually oriented businesses such as adult theaters, but that ordinance was not at issue in the lawsuit. *Id.* at 404. Rather, the lawsuit concerned a separate and more general ordinance that

was so broad that it could have regulated erotic dancing by even *fully clothed* performers in any business establishment, not merely in sexually oriented businesses. Because the city enacted that ordinance without any preamble, findings, legislative record, or supporting evidence tying the ordinance to prevention of secondary effects, *id.* at 405, the Seventh Circuit found that the city failed to present any justification why it was essential to regulate such a wide universe of dance. Accordingly, the Seventh Circuit ruled the ordinance unconstitutional. *Id.* at 411-12, 416.

Here, by sharp contrast, Daytona Beach has enacted a much more limited ordinance that, in the face of extensive evidence that the combination of alcohol and nudity exacerbates adverse secondary effects, merely requires erotic dancers who perform within 500 feet of an alcohol establishment to wear slightly more covering than pasties and G-strings. Therefore, the Seventh Circuit's decision in *R.V.S.* does not create a circuit split with the Eleventh Circuit's decision below.

CONCLUSION

The decision below is faithful to, and a straightforward application of, this Court's on-point precedents. It presents no novel question of law warranting the granting of Daytona Grand's petition for a writ of certiorari. This case is not the genesis of any lower-court conflict, and Daytona Grand's identification of extraneous (alleged) conflicts does not make this case the proper vehicle for resolution of issues that this case does not raise. For the foregoing

reasons, the City of Daytona Beach respectfully urges the Court to deny the petition.

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Respectfully submitted,

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